No. 89-911 (4)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CONSOLIDATED OIL & GAS, INC.,
Petitioner,

v.

SOUTHERN UNION COMPANY

and

FEDERAL ENERGY REGULATORY COMMISSION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Notwithstanding the conflicting judgments issued by the D.C. Circuit and the New Mexico Supreme Court in this case, Southern urges this Court not to resolve the conflict. It says the writ should be denied for essentially three reasons: (1) even though Southern expressly requested the state courts to decide the preemption question, it now says those courts had *no jurisdiction* over that question and the D.C. Circuit was therefore authorized to redetermine it; (2) Southern furthermore says that it "reserved" its "right" to *relitigate* the preemption question in the federal courts; and (3) Southern says that there is in any event no need for this Court to resolve the contradictory commands of the D.C. Circuit and the New Mexico Supreme Court; instead, says Southern, because a Colorado bankruptcy court happens fortuitously to be reviewing Consolidated's unrelated, pending bankruptcy petition, this case can be "adjudicated to

a conclusion" in that court once FERC issues a refund order carrying out the D.C. Circuit's decision.

Surprisingly, FERC also urges that the petition be denied, even though its orders have been overturned by the D.C. Circuit. Reversing itself both on the merits of the underlying preemption question as well as on the jurisdiction of the state courts to resolve that question, FERC joins Southern in contending that only FERC itself, subject to review by the federal courts, had authority to determine the preemption question.

None of the arguments now advanced by Southern and FERC are right.[1] But more significantly, those arguments do not and cannot answer the most compelling reason for certiorari in this case—to resolve the outstanding, contradictory judgments of the New Mexico Supreme Court and the D.C. Circuit. A denial of certiorari will *not* resolve that contradiction. Instead, it will simply leave the D.C. Circuit's orders standing, just as this Court's denial of certiorari to the New Mexico Supreme Court left that court's orders standing. Both courts' orders cannot be right and, more importantly, both *cannot be obeyed.* Only this Court has jurisdiction over both courts, and only a decision by this Court can now determine which court's orders should be followed.

1. Neither FERC nor Southern cites any authority for their contention that federal agencies and the federal

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[1] Both FERC and Southern also argue the merits of the underlying preemption/*Arkla* issue in their Oppositions, and imply that our petition is weakened by our failure to raise that question before this Court. FERC Opposition ("Opp.") 11 n.9; Southern Opp. 15 n.14. But that is not so. While we strongly believe the New Mexico Supreme Court correctly resolved that question, our position is that neither the D.C. Circuit—nor even this Court—had authority to redetermine that question after the New Mexico court's judgment became final. It was for *that* reason we did not raise the question in our petition. *See, e.g., City of Tacoma* v. *Taxpayers of Tacoma,* 357 U.S. 320, 334 (1958) ("obviously [a lower] court, *like this one,* may not . . . re-examine and decide a question which has been finally determined by a court of competent jurisdiction in earlier litigation between the parties") (emphasis supplied).

courts have exclusive jurisdiction to decide federal preemption questions. That is because there is none. It has long been settled that state and federal courts have *concurrent* jurisdiction to decide *all* federal issues, unless Congress has expressly provided to the contrary.[2] While it is true that "Congress . . . has granted exclusive authority over [natural gas] rate regulation to [FERC]," *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 580 (1981) (*"Arkla"*), Congress has *not* granted exclusive authority to the federal courts to decide whether the existence of FERC's regulatory authority precludes various state causes of action.

Thus, as this Court held in *Pan Am. Petroleum Corp.* v. *Superior Court of Delaware*, 366 U.S. 656 (1961), the Natural Gas Act does *not* oust the state courts from deciding the extent to which that federal Act governs or precludes state causes of action concerning regulated gas; for the Act itself nowhere "deprive[s] the state courts of the power to determine *questions* arising under the [Act] . . . ."[3] Indeed, the proposition that state courts may decide preemption questions raised by FERC's regulatory authority is so well settled that this Court has recently decided at least four such questions coming from state supreme courts—including the *Arkla* case itself—and in *none* of those cases was the issue of the state courts' jurisdiction over the questions even mentioned.[4] Even so,

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[2] *See, e.g., Hathorn* v. *Lovorn*, 457 U.S. 255, 266-67 (1982); *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. 473, 477-78 (1981); *Charles Dowd Box Co.* v. *Courtney*, 368 U.S. 502, 507-09 (1962); *Clafin* v. *Houseman*, 93 U.S. 130, 136-37 (1876).

[3] *Id.* at 664 (quoting *Pratt* v. *Paris Gas Light & Coke Co.*, 168 U.S. 255, 259 (1897) (emphasis in original)). *Accord Atlantic Coast Line R.R.* v. *Bhd. of Locomotive Eng'rs*, 398 U.S. 281, 294-96 (1970) (state court has concurrent jurisdiction to decide federal preemption question); *see Hathorn* v. *Lovorn*, 457 U.S. at 266 & n.18 ("even a finding of exclusive federal jurisdiction over claims arising under a federal statute usually 'will not prevent a state court from deciding a federal question collaterally' ") (quoting *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. at 483 n.12).

[4] *Mississippi Power & Light Co.* v. *Mississippi*, 108 S.Ct. 2428, 2438 n.11 (1988); *Transcont. Gas Pipe Line Corp.* v. *State Oil &*

the fact that this Court entertained the preemption question in all those cases necessarily constituted a determination that the state courts had jurisdiction to decide such questions.[5]

Southern's and FERC's current arguments to the contrary are all based on their confusion of FERC's exclusive jurisdiction over interstate natural gas prices with the federal and state courts' concurrent jurisdiction to decide other federal questions arising under the NGA and NGPA. Obviously, it is one thing to say that FERC has exclusive jurisdiction over interstate gas rates; it is something quite different to say that FERC has exclusive jurisdiction to determine whether the existence of its regulatory authority precludes a particular state cause of action.

Notwithstanding what they now contend, Southern and FERC do understand the distinction between these two kinds of jurisdiction. As Southern expressly argued to the New Mexico courts when it urged those courts to decide the preemption question in its favor, "this Court and FERC have *concurrent* jurisdiction over the regulatory issues in this case . . . ."[6] Yet, having lost those

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Gas Bd., 474 U.S. 409, 414-15 (1986); *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953, 961 (1986); *Arkla*, 453 U.S. at 575. *See also New Orleans Pub. Serv., Inc.* v. *Council of New Orleans*, 109 S.Ct. 2506, 2521 (1989) (Rehnquist, C.J., concurring in part in opinion and concurring in judgment) (state may empower its courts to decide FERC-related federal preemption claims).

[5] This Court has long recognized that in every case coming before it, the Court must first determine its own jurisdiction, and that the Court has no jurisdiction to decide the merits of any question the lower court had no jurisdiction to decide. *See United States* v. *Corrick*, 298 U.S. 435, 440 (1936); *Mansfield, C. & L.M. Ry.* v. *Swan*, 111 U.S. 379, 382-83 (1984).

[6] Southern's Reply Brief in Support of Motion to Stay Proceedings at 19 (emphasis supplied). Indeed, Southern stated to the New Mexico trial court that it "accepts the *Pan American* court's decision" that the state court has jurisdiction to decide the FERC-related issues in this case and "does not question the jurisdiction of this Court to proceed with [those issues] . . . ." *Id.* at 15.

issues before the state courts, Southern now claims that those courts had no jurisdiction to decide them. The claim is not only flatly contrary to Southern's and FERC's position before the state courts,[7] but, as we have shown, it is also clearly wrong.[8]

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[7] Before the state courts, FERC declined to take jurisdiction over all issues related to the interstate gas contracts at issue, stating:

> [W]e see no reason to exercise jurisdiction over the contractual aspects of this case. As in *Arkla* v. *Hall*, the favored nations clauses in the Consolidated contracts do not require special expertise for their construction; there is no need for uniformity of construction; *and the case is not important to the regulatory responsibilities of the Commission.* [App. 23a; emphasis supplied.]

Now, however, FERC says that if the Commission itself does not rule on *all* such issues in *all* such cases, it "would frustrate the purposes of exclusive federal regulation." FERC Opp. 10. FERC never explains why that would be so nor why it has totally reversed its position on the issue.

[8] Lacking legal authority for its claim that FERC and the federal courts have exclusive jurisdiction over preemption questions, Southern relies on this statement from our D.C. Circuit rehearing petition: "FERC's determination of the federal preemption issues is conclusive . . . ." Southern Opp. 18 (quoting Rehearing Petition at 14). As Southern knows, this statement was contained in our argument concerning the deference owed to FERC's view of its own jurisdiction. Our argument was that FERC's view on the preemption issue should have been treated as conclusive by any court deciding the issue; we certainly did not argue that no state court had jurisdiction to decide the issue at all.

Southern also seeks to support its exclusive jurisdiction argument by noting that, at the time FERC declined to express a view on the preemption issue, it reserved the right to do so at a later time, Southern Opp. 18-19 (citing App. 23a-24a), and that this "reservation" was affirmed by the D.C. Circuit in a decision reached before the New Mexico Court ruled on the merits of the preemption issue. Southern Opp. 19-20 (citing *Consol. Oil & Gas, Inc.* v. *FERC*, 806 F.2d 275 (D.C. Cir. 1986)). It is difficult to see how this supports Southern's argument. Nothing in FERC's orders or the D.C. Circuit's first decision even remotely supports the proposition that FERC's undoubted jurisdiction to speak on the preemption issue is *exclusive*.

Furthermore, it is difficult to see a principled stopping place for the rule now espoused by FERC and Southern. Virtually every federal agency has exclusive authority to perform some responsibility under its enabling statute. Under FERC's and Southern's current approach, the jurisdiction of state courts to decide *any* issues arising under any such statute would be in serious doubt, so long as the issues were related in any way to the agency's exclusive authority.[9] Such a wholesale deprivation of state-court jurisdiction cannot be squared with the authority and competence of state courts to decide federal issues, with anything in the NGA, NGPA, or similar statutes,[10] or with the contrary command of 28 U.S.C. § 1738. It should not be condoned by this Court.

2. Equally unsound and just as contradictory to Southern's previous position is its current claim that it "re-

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[9] FERC contends that this must be so, for otherwise the agency would be required "to . . . intervene in any private actions that raise claims that might affect FERC's regulatory jurisdiction . . . ." FERC Opp. 10. But this is clearly not so. Obviously, state and federal courts often decide agency-related issues in cases where the agency itself is not a party; and in all such cases, the doctrines of agency deference and primary jurisdiction assure that the agency's views and prerogatives are given due weight.

Alternatively, FERC insists that because it was not a party to the New Mexico court proceedings, res judicata principles did not apply to *it* in the D.C. Circuit proceedings. FERC Opp. 9 n.8. But the fact that FERC was not nominally a party until the D.C. Circuit proceedings is irrelevant. What matters is that in state litigation between Southern and Consolidated a final judgment determined that Consolidated's tort action was not preempted. The D.C. Circuit was not free to overturn that judgment simply because FERC was added as a party to the federal proceeding.

[10] Since there is nothing in the language or legislative history of the NGA or NGPA to support its current exclusive-jurisdiction claim, FERC cites two instances under the federal bankruptcy laws where Congress did in fact exclude state courts from litigating certain issues within the peculiar expertise of the bankruptcy courts. FERC Opp. 9 (citing *Brown* v. *Felsen*, 442 U.S. 127 (1979); *Kalb* v. *Feuerstein*, 308 U.S. 433 (1940)). Nothing comparable to those specialized situations is presented here.

served its right" to litigate the preemption question in the federal courts. Southern Opp. 22. Southern most certainly did not "reserve" that right. Instead, it fully and voluntarily litigated the preemption question up through the New Mexico Supreme Court and, when it lost there, unsuccessfully sought certiorari from this Court. In such circumstances, both this Court's decisions and 28 U.S.C. § 1738 precluded Southern from relitigating the question in the D.C. Circuit—and likewise precluded the D.C. Circuit from redeciding that question. *See* Petition for Certiorari ("Pet.") 12-15. In order to advance its current, contrary view, Southern distorts the record,[11] ignores 28 U.S.C. § 1738, and completely misreads this Court's decision in *England* v. *Louisiana State Bd. of Med. Examiners*, 375 U.S. 411 (1964).

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[11] Southern implies that the New Mexico courts forced it to litigate its preemption claim in both the state and federal courts. Thus, it contends that "it was the New Mexico courts' . . . refusal to stay their proceedings and judgments pending the outcome of this federal proceeding, and the New Mexico Supreme Court's decision to rely on the FERC's order (when review of that order was pending in the D.C. Circuit)—that gave rise to the duplicative litigation" in this case. Southern Opp. 28 n.26. This is wholly incorrect for several reasons.

First, and most important, Southern fully and *voluntarily* presented its preemption question to the state courts; it could have reserved that question for presentation to the D.C. Circuit, but it did not do so. Second, it is unseemly at best for Southern to fault the New Mexico Supreme Court for ruling on the preemption issue while FERC's orders were on appeal to the D.C. Circuit, given that Southern expressly asked the court to do so. Third, the only stay of proceedings Southern ever sought from the state courts was that those courts should await FERC's view on the preemption question before ruling on that question themselves. This the state courts did. Finally, Southern's claim that the New Mexico courts should have stayed their judgments while Southern attempted to collaterally attack them in the federal courts not only has no legal basis, but it ignores the true cause of the "duplicative litigation" that resulted. The cause was certainly not the New Mexico courts' refusal to stay their judgments; it was Southern's attempts to collaterally attack those judgments in the D.C. Circuit.

In *England*, this Court held that, when a federal district court has abstained in a proceeding and has relegated a party to the state courts, that party may nevertheless litigate his federal claims in the federal court by informing the state courts "what his federal claims are" and that he "intends . . . to return to the District Court for disposition of his federal contentions." 375 U.S. at 420, 421. Alternatively, the party may "submit his entire case to the state courts, relying on the opportunity to come [to the Supreme Court] if the state decision on his federal claims should go against him." *Id.* at 418. But if he does the latter, *i.e.*, if he "unreservedly litigate[s] his federal claims in the state courts although not required to do so," he cannot "ignore the adverse state decision and start all over again in the District Court." *Id.* at 419.

Southern now says it *is* entitled to start all over again in the federal courts because it "reserved" the "right" to do so; that is, Southern says that because it told the New Mexico Supreme Court that it intended to relitigate its federal claim in the federal courts if it lost in the state courts, it has a right to do so under *England*. This is surely not a serious contention.

The rationale of *England* was to preserve a party's choice to litigate his federal claims in federal court *rather than* state court. It was certainly not a holding that all parties who wish to litigate in federal court after losing in state court acquire a "right" to do so simply by announcing to the state court that that is their intention. Such a rule would render *all* state court resolutions of federal questions advisory opinions subject to redetermination in federal courts. It would furthermore make nonsense of the concept of concurrent state and federal jurisdiction over federal issues, would completely eviscerate well-established principles of comity and federalism, would violate the command of 28 U.S.C. § 1738, and would contradict this Court's repeated holdings that federal courts have *no jurisdiction* to review final state court

judgments.[12] Southern's claim that such a rule is the law and justifies the D.C. Circuit's decision has no merit whatever.

3. While we believe the fundamental issues of federal/state court jurisdiction, comity, and federalism raised by this case all merit this Court's review, the most compelling reason warranting certiorari in this case remains the "head-on collision" between the federal and state court systems. *See* Pet. 11-12. Significantly, FERC and Southern have no remedy for this collision. Instead, they simply assume that the D.C. Circuit's judgment will be followed in preference to the New Mexico Supreme Court's judgment.[13]

Thus, Southern says that once certiorari is denied, FERC will issue a refund order against Consolidated and the matter then "can be adjudicated to a conclusion" in the Colorado bankruptcy court. Southern Opp. 29. By this, Southern clearly means that the bankruptcy court should simply carry out the D.C. Circuit's judgment; Southern has in fact already informed the former court that it is "bound to follow the D.C. Circuit decision."[14] But it has never informed that court—or this Court—how the parties or the lower courts are to choose between the final, contradictory judgments of the D.C. Circuit and the New Mexico Supreme Court.

Similarly, FERC says that "[u]nder a straightforward application of the filed rate doctrine, the court of appeals' judgment that federal law precluded the state court damages award *means that the state court's contrary hold-*

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[12] *See District of Columbia Court of Appeals* v. *Feldman*, 460 U.S. 462, 476, 482 (1983); *Atlantic Coast Line R.R.*, 398 U.S. at 296; *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413, 415-416 (1923).

[13] Illustrative of Southern's confidence on this point is the startling admission in its Opposition that "[b]ecause of the D.C. Circuit's decision," it has "decided *not to pay*" the interest on the outstanding tort judgment *ordered* by the New Mexico Supreme Court. Southern Opp. 13 n.13 (emphasis supplied).

[14] Southern's Answer and Counterclaim ¶ 20 (Bankr. D. Colo.) (filed January 2, 1990).

ing was preempted by federal law." FERC Opp. 9 (emphasis supplied). But of course it means no such thing; rather, FERC has simply confused, again, the fact that certain state-law causes of action may be preempted by federal law with the fact that state courts have concurrent jurisdiction to determine whether such preemption has occurred.

The New Mexico Supreme Court determined in this case that such preemption did not occur. The lower federal courts—including the D.C. Circuit—have no authority to sit in review of such state court judgments and thereby "preempt" them. Only this Court may do that, and it chose not to do so when it denied certiorari to the New Mexico Supreme Court. Nevertheless, the D.C. Circuit has chosen to redetermine the very federal question this Court chose not to review, and the result of that choice has been to put the two lower courts at loggerheads and to subject the parties to two contradictory judgments. Only this Court has jurisdiction to resolve the contradiction and to extricate the parties and the lower courts from this untenable impasse.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted and the judgment below reversed.

Respectfully submitted,

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